

RH02023676
TITLE 10
CHAPTER 5
SUBCHAPTER 3
ARTICLE 19
REGULATIONS FOR ENFORCEMENT ACTIONS AND PENALTIES

Section 2591. Preamble.÷

(a) The purpose of this article is to meet the requirements of Insurance Code section 12921.1, paragraph (a)(7). This statute pertains to violations of statutes ~~and~~or regulations which are discovered in the investigation of consumer complaints and requires that the commissioner establish a list of criteria to determine which violations by insurers should be pursued through enforcement action and to establish enforcement guidelines that set forth appropriate penalties for violations based on the nature, severity, and frequency of the violations.

(b) Pursuant to the commissioner's authority to enforce the Insurance Code, this article shall also apply to actions arising from the findings generated by other ~~regulatory enforcement~~ activities that allege violations of the same statutes ~~and~~or regulations. These activities include but are not limited to such as market conduct examinations or other Department investigations, examinations, or reviews of insurer conduct. This article is intended to provide greater uniformity in enforcement and in the general assessment of penalties imposed upon insurers.

Note: Authority cited: Sections 790.10 and 12921.1, Insurance Code; *CalFarm Insurance Company v. Deukmejian*, 48 Cal.3d 805 (1989); *20th Century Insurance Company v. Garamendi*, 8 Cal. 4th 216 (1994). Reference: Sections 704.7, 769.86, 789.3, 790.035, 790.036, 790.07, 790.10, 1858.07, 1858.1, 1858.3, 1859.1, 1861.14, 10140.1, 10140.5, 10149.1, 10199.7, 10234.3, 10509.9, 11756, 12414.25 and 12921.1, Insurance Code.

Section 2591.1. Scope and purpose.÷

(a) This article applies to those provisions of the California Insurance Code that ~~grant~~allow the commissioner discretion in pursuing a penalty against an insurer ~~and~~or in setting the penalty amount. The ~~commissioner~~Department shall apply the criteria provided in Section 2591.3 of this article to determine whether a particular violation warrants an enforcement action and to determine the amount of penalty within the applicable statutory range of penalties. The provisions of this article are appropriate for determining the penalty imposed in those cases which are resolved through ~~the execution of a settlement stipulation.~~

(b) Enforcement action.

(1) For purposes of this article, enforcement action means any action based on an allegation by the Department that an insurer has committed a violation to which a penalty provision set forth in any of the statutes listed in subdivision (c) below applies, over the course of which action one or both of the following is to occur:

(A) The execution of a Stipulation and Consent Order or other settlement document.

(B) which is initiated through the issuance of a Notice of Noncompliance, an Order to Show Cause, Accusation, Statement of Issues, or other formal document legal pleading which

~~alleges a violation to which penalty provisions set forth in any of the statutes listed below apply.~~

(2) For purposes of this article, ~~enforcement actions do not include~~ regulatory activity such as warning letters, verbal warnings, market conduct examinations or market conduct examination reports does not constitute an enforcement action.

(c) This article applies to any insurer subject to penalty under any of the following statutes: Insurance Code sections 704.7, 769.86, 789.3, 790.035, 790.036, 790.07, 1858.07, 1858.1, 1858.3, 1859.1, 1861.14, 10140.1, 10140.5, 10149.1, 10199.7, 10234.3, 10509.9, 11756, and 12414.25.

(d) The provisions of this article ~~do not apply to any case in which the insurer disputes the existence of a violation and which results in an administrative order, judicial decision or settlement conference ordered pursuant to the Administrative Procedure Act~~ are not intended to be consulted by a hearing officer, judge or trier of fact in connection with an action brought by the Department. The provisions of this article are not intended to be used in determining an appropriate settlement in connection with a settlement conference ordered pursuant to any applicable rule of court or provision of the Administrative Procedure Act. To the extent that the provisions of this article conflict with the provisions of any statute or other regulation that more specifically addresses a particular violation, this article shall be inapplicable.

NOTE: Authority cited: Sections 790.10 and 12921.1, Insurance Code; *CalFarm Insurance Company v. Deukmejian*, 48 Cal.3d 805 (1989); *20th Century Insurance Company v. Garamendi*, 8 Cal. 4th 216 (1994). Reference: Sections 704.7, 769.86, 789.3, 790.035, 790.036, 790.07, 790.10, 1858.07, 1858.1, 1858.3, 1859.1, 1861.14, 10140.1, 10140.5, 10149.1, 10199.7, 10234.3, 10509.9, 11756, 12414.25 and 12921.1, Insurance Code.

Section 2591.2. ~~The commissioner~~Department shall examine the violations committed by the insurer. ~~The commissioner~~Department shall take into consideration the criteria listed in Section 2591.3 and any other relevant considerations to determine if the seriousness of the insurer's act warrants an enforcement action. ~~Similarly, if after a review of those criteria the commissioner~~Department ~~determines that a penalty~~determines that a penalty ~~an enforcement action is warranted, the commissioner~~Department shall take into consideration the criteria listed in Section 2591.3 and any other relevant considerations to determine an appropriate ~~shall impose a penalty for each act in violation of the law from within the applicable statutory penalty range or ranges. In addition to the actual penalty amount, the Department may also recover its costs associated with the enforcement action, including but not limited to attorneys' fees.~~

NOTE: Authority cited: Sections 790.10 and 12921.1, Insurance Code; *CalFarm Insurance Company v. Deukmejian*, 48 Cal.3d 805 (1989); *20th Century Insurance Company v. Garamendi*, 8 Cal. 4th 216 (1994). Reference: Sections 704.7, 769.86, 789.3, 790.035, 790.036, 790.07, 790.10, 1858.07, 1858.1, 1858.3, 1859.1, 1861.14, 10140.1, 10140.5, 10149.1, 10199.7, 10234.3, 10509.9, 11756, 12414.25, 12921 and 12921.1, Insurance Code.

Section 2591.3. In determining that an enforcement action should be pursued and in selecting the appropriate amount of the penalty from the applicable range of penalty amounts that could be assessed, the ~~commissioner~~Department shall consider:

(a) ~~The detrimental impact, and the severity of the impact, resulting from~~ the nature of the violation, including but

~~1. Detrimental impact includes but is not limited to adverse actions such as overcharge of premium, unlawful denials or terminations of coverage, placement in a program or tier with a higher rate level or less coverage than the most favorable for which the insured~~

would qualify, misrepresentations of terms, unlawful denial or delay of claims, unreasonably low claims offers or settlements, improper sharing of personal information, acts of unfair competition and acts of unfair discrimination.

(b)2. The severity of the impact violation.

(1) Severity of the violation includes but is not limited to:

- (A) the extent of harm revealed through a consumer complaint or otherwise brought to the attention of the Department;
- (B) the amount of premium overcharge or undercharge;
- (C) the amount of underpayment of a claim;
- (D) a comparison of the length of the delay to the time reasonably necessary or legally required to conduct the process or transaction;
- (E) the significance of the amount of premium involved in relation to the total premium for the coverage; and
- (F) the significance of the amount of underpayment of the loss settlement offer or final settlement involved in relation to the total loss settlement determined to be reasonable.

(2) Consideration may also be given to the necessary complexity of the transaction in determining the severity of the act.

(c)1. The frequency of the occurrence of the violation. In determining the frequency, consideration may be given to the number of violations specifically identified and the number of persons reasonably determined to have been impacted over a given period of time by such violations within the insurer's population of applicants, insureds, claimants, potential applicants or among its competitors and to the number of files in which the violation takes place compared to the number of files with a similar transaction but no violation.

(d) The knowledge or willfulness of the non-compliant act.

(1) Violations that may be considered willful or knowingly committed include but are not limited to the following:

- (A)1. When the insurer ~~knowingly acts in violation of~~ is aware at the time of the act that it is violating the law;
- (B)2. When the insurer reasonably should have known of the act's unlawfulness when the non-compliant actions occurred;
- (C)3. When the insurer has promulgated express policies or procedures that are in noncompliance with the law;

~~(D)4.~~ When the insurer has failed to adopt, communicate and implement reasonable standards for consistent, compliant activity; or

~~(E)5.~~ When the insurer has failed to take effective remedial measures when a violation was identified or discovered.

~~(2)~~ In the case of an employee, ~~or agent or contract entity~~ conducting business on the insurer's behalf, knowledge or willfulness shall be attributed to the insurer unless the employee, agent or contract entity has acted outside of the scope of the employment, agency or contract ~~or otherwise not in the interest of the insurer at the time the act is committed.~~

~~(e)~~ The monetary effect of the violation on the insurer. For purposes of this criterion, consideration will be given to the amount of monetary gain or loss experienced by the insurer as a result of the violation.

~~(f)~~ The compliance record of the insurer. The compliance record includes but is not limited to the following:

~~(1)~~ The number and type of violations identified in the investigation of consumer complaints generated by the insurer over a given period of time or the number and type of violations reported in a previous examination or investigatory report;

~~(2)~~ The insurer's cooperation and prompt, good-faith actions taken to provide restitution and correct any non-compliant activity ~~and provide restitution to affected consumers, particularly if including where~~ the noncompliance is discovered and resolved prior to the Department's involvement;

~~(3)~~ The insurer's failure to take action in response to previous notifications identifying the non-compliant activity;

~~(4)~~ The insurer's failure to implement its express commitments to take corrective action; ~~or and~~

~~(5)~~ Any previous ~~related~~ action taken against the insurer.

~~(g)~~ The duration of the non-compliant activity. For purposes of this criterion, consideration will be given as to whether the violation was a single event or violations continued repeatedly over a given period of time.

~~(h)~~ The existence of extraordinary circumstances. Extraordinary circumstances are circumstances outside of the control of the insurer that severely and materially affect the insurer's ability to comply with the law. Extraordinary circumstances do not include circumstances which the insurer could reasonably anticipate and prepare for or prevent.

~~(i)~~ Previous actions taken by the ~~commissioner~~ Department against other insurers for similar noncompliance. For purposes of this criterion, consideration shall be given to previous actions for similar violations by insurers of similar size and circumstance. However, such consideration shall not preclude the ~~commissioner~~ Department from taking an enforcement action where no previous action had been taken or from seeking an increased or decreased penalty amount relative to a previous penalty amount.

NOTE: Authority cited: Sections 790.10 and 12921.1, Insurance Code; *CalFarm Insurance Company v. Deukmejian*, 48 Cal.3d 805 (1989); *20th Century Insurance Company v. Garamendi*, 8 Cal. 4th 216 (1994). Reference: Sections 704.7, 769.86, 789.3, 790.035, 790.036, 790.07, 790.10, 1858.07, 1858.1, 1858.3, 1859.1, 1861.14, 10140.1, 10140.5, 10149.1, 10199.7, 10234.3, 10509.9, 11756, 12414.25 and 12921.1, Insurance Code.

Section 2591.4. (a) ~~Equal consideration need not be given to each criterion described in these guidelines~~Section 2591.3. The commissioner~~Department~~ shall determine which criteria are relevant under the circumstances and shall determine the appropriate consideration to be given to those criteria. Neither inapplicability of one or more criteria nor absence of harm shall mitigate the effect of any relevant criterion.

(b) The determinations made regarding the criteria that are relevant for purposes of the decision as to whether an enforcement action is to be pursued may differ from the determinations made in the same case regarding the criteria that are relevant for purposes of the decision as to the appropriate penalty. Likewise, the amount of consideration any relevant criterion is to receive for purposes of determining whether an enforcement action is to be pursued may, in the same case, differ from the amount of consideration, if any, which that criterion is to receive for purposes of determining the appropriate penalty.

(c) ~~The absence of any particular criterion from these guidelines does not preclude it from consideration by the commissioner~~In determining whether to take~~pursue~~ an enforcement action ~~or~~and in determining the appropriate penalty, the Department may, in circumstances it deems appropriate, consider matters not listed in Section 2591.3. When such other considerations enter into the settlement process, the basis for such~~those~~ considerations will be stated during the course of the~~any~~ settlement negotiations.

(d) The provisions of this article do not affect the commissioner's discretion to take any other measures such as seeking an order requiring specific corrective action, a hearing in accordance with statute, or the suspension or revocation of an entity's license or certificate of authority. Nothing in this article shall, in any manner, abridge or constitute a waiver of the attorney-client, work product, deliberative process or other privilege, or other right of confidentiality, afforded by rule, regulation, case law or statute, including but not limited to the California Evidence Code and the Federal Rules of Evidence.

NOTE: Authority cited: Sections 790.10 and 12921.1, Insurance Code; *CalFarm Insurance Company v. Deukmejian*, 48 Cal.3d 805 (1989); *20th Century Insurance Company v. Garamendi*, 8 Cal. 4th 216 (1994). Reference: Sections 704.7, 769.86, 789.3, 790.035, 790.036, 790.07, 790.10, 1858.07, 1858.1, 1858.3, 1859.1, 1861.14, 10140.1, 10140.5, 10149.1, 10199.7, 10234.3, 10509.9, 11756, 12414.25 and 12921.1, Insurance Code.